No. 73-2025 & No. 73-2028

SEP 9 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2025

JUNIOR CHAMBER OF COMMERCE OF ROCHESTER, INC.; JANIS GAINES, individually, and on behalf of all other persons similarly situated; JANE SELMAN, individually, and on behalf of all other persons similarly situated; CHARLES WETMORE, individually, and on behalf of all other persons similarly situated; JAMES T. BRUEN, individually, and on behalf of all other persons similarly situated; DAVID HEILIGMAN, individually, and on behalf of all other persons similarly situated; THOMAS BANASZEWSKI, individually, and on behalf of all other persons similarly situated; JOANN CLEVENGER, individually, and on behalf of all other persons similarly situated; SYDNEE SCHWARTZ, individually, and on behalf of all other persons similarly situated,

Petitioners,

v.

THE UNITED STATES JAYCEES; THE NEW YORK STATE JAYCEES; THE UNITED STATES JAYCEES FOUNDATION; THE JAYCEE MENTAL HEALTH AND MENTAL RETARDATION FUND; THE JAYCEES WAR MEMORIAL FUND; GEORGE P. SHULTZ, as Secretary of the Treasury of the United States, DON ALEXANDER, as Commissioner of the Internal Revenue; THE INTERNAL REVENUE SERVICE OF THE DEPARTMENT OF THE TREASURY OF THE UNITED STATES; HOWARD PHILLIPS, Acting Director of the Office of Economic Opportunity; JAMES LYNN, as Secretary of the Department of Housing and Urban Development; PETER J. BRENNAN, as Secretary of the Department of Labor; WILLIAM D. RUCKELSHAUS, as Administrator of the Environmental Protection Agency,

Respondents.

(Over)

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

No. 73-2028

THE JUNIOR CHAMBER OF COMMERCE OF PHILADELPHIA, PA.; THOMAS S. RITTENHOUSE; BEVERLY LYNN BENSON; MARGARET M. HIPPLE; ROBERTA M. SCHNEIDER,

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BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

	Page
Opinion Below, Jurisdiction, Constitutional and Statutory Provisions Involved	3
Question Presented	3
Counterstatement of the Case	3
Reason for Denying the Writ	7
Conclusion	10

CITATIONS

Cases:

Barrett v. *United Hospital*, No. 73 Civ. 1716 (S.D. N.Y. May 23, 1974)	9
Browns v. *Mitchell*, 409 F.2d 593 (10th Cir. 1969)	9
Burton v. *Wilmington Parking Authority*, 365 U.S. 715 (1961)	8
Fletcher v. *Rhode Island Hospital Trust & National Bank*, 496 F.2d 927 (1st Cir. 1974)	9
Gilmore v. *City of Montgomery*, 42 U.S.L.W. 4920 (U.S. June 17, 1974)	8
Grafton v. *Brooklyn Law School*, 478 F.2d 1137 (2d Cir. 1973)	9
Grossner v. *Trustees of Columbia University*, 287 F.Supp. 535, 547-48 (S.D. N.Y. 1968)	9
Jackson v. *Statler Foundation*, 496 F.2d 623 (2d Cir. 1974)	9
Moose Lodge No. 107 v. *Irvis*, 407 U.S. 163 (1972)	7, 8, 9
Mulvihill v. *Julva Butterfield Memorial Hospital*, 329 F.Supp. 1020 (S.D. N.Y. 1971)	9
New York City Jaycees, Inc. v. *United States Jaycees, Inc.*, No. 74 Civ. 652 (S.D. N.Y. June 3, 1974)	9
Norwood v. *Harrison*, 413 U.S. 455 (1973)	8
Powe v. *Miles*, 407 F.2d 73, 81 (2d Cir. 1968)	9
Wahba v. *New York University and Severo*, 492 F.2d 96, 102 (2d Cir. 1974)	8

CITATIONS—Continued

	Page
Walz v. *Tax Commission of City of New York*, 397 U.S. 664 (1970)	8
Ward v. *St. Anthony's Hospital*, 476 F.2d 671 (10th Cir. 1973)	9
Constitutional and Statutory Provisions:	
Fifth Amendment to the Constitution of the United States	3, 7, 10
26 U.S.C. §§ 501(c)(3)(4)	5
42 U.S.C. § 1983	6, 8

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OPINION BELOW, JURISDICTION, AND CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitions of the Junior Chambers of Commerce of Philadelphia and Rochester, and of the individual members of those organizations, set out the opinion below, the jurisdiction of this Court, and the constitutional and statutory provisions involved. (Rochester Petition 2-3; Philadelphia Petition 2.)

QUESTION PRESENTED

Whether the District Court and Court of Appeals erred in holding that the internal membership policies of a private organization, the Jaycees, formulated and enforced free of any government involvement, are not subject to the equal protection constraints of the fifth amendment upon mere receipt by that organization of federal tax benefits, grants and contracts?

COUNTERSTATEMENT OF THE CASE

A. Procedural History

On October 12, 1972, petitioners brought suit in the United States District Court for the District of Columbia against the United States Jaycees ("Jaycees"), the New York State Jaycees, the United States Jaycees Foundation ("Foundation"), the Jaycees Mental Health and Mental Retardation Fund, the Jaycees War Memorial Fund, and several federal officers and agencies. Petitioners' complaint challenged the Jaycees' policy, contained in its constitution and by-laws, of limiting membership to males. It sought a declaration that the Jaycees' membership policy violates the Constitution, an injunction requiring the Jaycees to restore the Rochester

chapter to membership, compensatory and punitive damages, attorneys' fees and court costs. With respect to the government parties, the suit asked for injunctive relief requiring the rescission of any tax exemptions, federal contracts or grants presently enjoyed by any organization which limits membership to males, including the Jaycees parties, and prohibiting any future tax exemptions, grants or contracts for such organizations. The convening of a three-judge court was also requested.

On February 7, 1973, pursuant to a directive of the United States Court of Appeals for the District of Columbia Circuit, the United States District Court for the District of Columbia transferred the case to the Northern District of Oklahoma. On April 9, 1973, the Jaycees parties answered the complaint, and on April 12, 1973, the government parties filed a motion to dismiss.

The United States District Court for the Northern District of Oklahoma, on May 4, 1973, ordered an evidentiary hearing for June 13, 1973, to consider the motion to dismiss, the convening of a three-judge court, the maintenance of the suit as a class action and other specified issues.[1] At that hearing petitioners presented oral testimony and introduced approximately one thousand pages of documentary evidence. The court heard argument from all parties.

On June 26, 1973, the district court filed its opinion dismissing the complaints of the original and interven-

[1] On May 24, 1973, twenty days after the hearing had been scheduled for June 13, 1973, and eight months after initiating this litigation, petitioners filed their first discovery requests and asked that the time for response be shortened in light of the scheduled hearing date. Over the objections of the Jaycees parties, the request to shorten the time was granted.

ing plaintiffs.[2] Petitioners then appealed to the United States Court of Appeals for the Tenth Circuit. On April 16, 1974, the Tenth Circuit affirmed the decision and order of the District Court.

B. Statement of Facts

The material facts are simple and undisputed:

1. The Jaycees respondents are civic organizations which are exempt from income taxation pursuant to Section 501(c)(4) of the Internal Revenue Code. The autonomously functioning Foundation is exempt from federal taxation by reason of Section 501(c)(3) of the Internal Revenue Code.

2. The Jaycees holds grants and contracts from agencies of the federal government which provide funds specifically earmarked for defined projects and expressly limit the use of the funds to such projects.

3. The Jaycees limits membership to males.

4. The affiliation of the Rochester and Philadelphia chapters was terminated because each determined that it would not abide by the Jaycees' policy of limiting membership to males.

5. The government does not dictate, influence or review the internal membership policies of the Jaycees.

6. There is no discrimination on the basis of sex or any other characteristic among beneficiaries of the projects funded by the government.

C. Decisions of the District Court and Court of Appeals

These facts were before the district court and the Tenth Circuit when each held that the necessary connec-

[2] In July 1972 the Philadelphia Junior Chamber of Commerce admitted women to its organization. After notice from the Jaycees that it was in jeopardy of being expelled, the Philadelphia chapter and several of its members sought and received permission to be added as plaintiffs to this action.

tion between the federal funds and the internal membership policies of the Jaycees had not been established and, accordingly, that the state action doctrine was inapplicable to petitioners' allegations. Both courts specifically held that petitioners had failed to allege or prove any government involvement in the internal workings of the Jaycees, including the organization's membership policies, or any discrimination by the Jaycees in the distribution of federal funds among beneficiaries of the programs.

In affirming the district court's dismissal of the complaint, the Court of Appeals stated:

> We fail to see that there is present the essential state action . . . . The plaintiffs would have us rule that because the Jaycees are *used* by the state government to dispense funds on its behalf that all their conduct automatically becomes state action subject to a § 1983 suit regardless of whether there exists discrimination by the private entity in the dispensing of the funds. In effect, then, plaintiffs say that the state must, consistent with the Constitution, refrain from dealing with discriminators regardless of whether the discrimination is related to the alleged state action. We disagree. (Rochester Petition A-8; Philadelphia Petition 9a.)

The court concluded that:

> The membership policy against which the attack has been leveled has no connection with the state activity of the United States Jaycees. Neither the complaint nor the record establishes or promises to establish the kind of state involvement essential to a civil rights action under § 1983. (Rochester Petition A-9; Philadelphia Petition 10a.)

In analyzing petitioners' allegations of federal involvement, through tax benefits, grants and contracts, in the internal membership policies of the Jaycees, the appellate

court concluded that a causal connection did not exist between the internal activities of the Jaycees and the government which would require the application of constitutional standards to otherwise private conduct.

> . . .[T]he question is whether the United States is obligated to see to it that the United States Jaycees' conduct shall be exemplary quite apart from its administering of programs and governmental funds. No case has been cited which extends to this length. On the contrary, the criteria announced by the Supreme Court have tended to require that the alleged unconstitutional conduct relate specifically to governmental action. (Rochester Petition A-11-A-12; Philadelphia Petition 12a.)

REASON FOR DENYING THE WRIT

This case does not present a novel construction of the fifth amendment. Petitioners merely seek to have this Court review the Tenth Circuit's affirmance of the district court's determination that the *facts* alleged and proved by petitioners are insufficient to establish a causal link between the complained of private activity and the government. Review of that essentially factual determination, absent a substantial federal question as to the applicable law, is inappropriate for certiorari.

The district court reviewed petitioners' extensive evidence in considering whether a nexus existed between the federal contracts, grants and tax benefits and the challenged Jaycees' membership policies. On the basis of the record before it, the district court properly concluded that such a connection had neither been alleged nor proved. The Tenth Circuit affirmed that decision.

The decision of the Court of Appeals is in full accord with the decisions of this Court. *Moose Lodge No. 107* v.

Irvis, 407 U.S. 163 (1972);[3] *Walz* v. *Tax Commission of City of New York*, 397 U.S. 664 (1970).[4] The Court of Appeals correctly concluded that petitioners had failed to state a claim under 42 U.S.C. § 1983 or the Constitution.

Restrictive membership policies in private associations, even where such policies are drawn with reference to race, are not subject to constitutional strictures unless a "nexus" exists between those restrictive policies and substantial government involvement. *Irvis*, *supra*.[5] This is not a case in which property of the government, or property dedicated or committed to a public use, is employed to promote a plan of invidious discrimination. *See Gilmore* v. *City of Montgomery*, 42 U.S.L.W. 4920 (U.S. June 17, 1974); *Norwood* v. *Harrison*, 413 U.S. 455 (1973); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). The Jaycees is merely a conduit for federal funds. Here petitioners do not allege that intended beneficiaries of the projects funded by the government are discriminated against. Rather, petitioners'

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[3] In *Irvis* this Court held that the goevrnment must be "significantly involved itself with invidious discriminations" before there is a constitutional violation. 407 U.S. at 173.

[4] In *Walz* this Court stated:

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees "on the public payroll." 397 U.S. at 675.

[5] Without a "nexus" requirement the "essential dichotomy" between private and government action would have no meaning. *See* Civil Rights Cases, 109 U.S. 3 (1883). Moreover, if private organizations in receipt of public funds were required to remake their internal organization in the image of society generally they would be discouraged from participating in publicly useful activities. *See* Wahba v. New York University and Severo, 492 F.2d 96, 102 (2d Cir. 1974).

complaint is that an organization which channels the benefits of these projects to other community organizations and agencies restricts its membership to men. There is no allegation that the government is involved in the Jaycees' internal membership policies. Indeed, the facts before the Court of Appeals and the district court make clear that the government plays no "part in establishing or enforcing the membership . . . policies" of the Jaycees. *Irvis, supra,* at 175.

Moreover, the decision of the Tenth Circuit is fully consistent with the decisions of that Circuit, *Ward* v. *St. Anthony's Hospital*, 476 F.2d 671 (10th Cir. 1973); *Browns* v. *Mitchell*, 409 F.2d 593 (10th Cir. 1969), as well as the decisions of other circuits, *e.g., Fletcher* v. *Rhode Island Hospital Trust & National Bank*, 496 F.2d 927 (1st Cir. 1974); *Jackson* v. *Statler Foundation*, 496 F.2d 623 (2d Cir. 1974), which have held that only where the government involvement has a significant and specific connection with the allegedly unconstitutional conduct under attack will the requisite degree of state involvement be established requiring the invocation of constitutional standards. Where, as here, no such causal relationship has been or can be established, the internal policies of a private organization are immune from constitutional scrutiny. *E.g., Irvis, supra; Fletcher, supra; Jackson, supra; Ward, supra; Browns, supra.*[6]

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[6] While this appeal was pending in the Tenth Circuit, the New York City Jaycees, Inc. brought a similar suit against the United States Jaycees in the District Court for the Southern District of New York. The New York City Jaycees, Inc. v. United States Jaycees, Inc., No. 74 Civ. 652 (June 3, 1974). An appeal from the decision of the district court in that case was noted by the defendants therein on June 28, 1974. The decision of the District Court for the Southern District of New York is in direct conflict with decisions of its own court of appeals. Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973); Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968). *Cf.* Barrett v. United Hospital, No. 73 Civ. 1716 (S.D.N.Y., May 23, 1974); Mulvihill v. Julva Butterfield Memorial Hospital, 329 F.Supp. 1020 (S.D.N.Y. 1971); Gross-

CONCLUSION

The decision of the Tenth Circuit does not give rise to a substantial question regarding the parameters of the fifth amendment. The decision addresses a factual determination of whether petitioners' allegations and proof of a causal relationship between the government and the internal membership policies of the Jaycees were sufficient to mandate adherence to constitutional requirements. Having reviewed the record developed by petitioners in light of its own decisions and those of this Court, the Tenth Circuit concluded that the allegations before it were insufficient to establish such a nexus. That decision is fully in accord with the opinions of this Court and of other circuits.

Accordingly, the Jaycees respondents submit that the decision of the Tenth Circuit is correct and that the Petitions of the Junior Chamber of Commerce of Rochester and Philadelphia should be denied.

Respectfully submitted,

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ner v. Trustees of Columbia University, 287 F.Supp. 535, 547-48 (S.D.N.Y. 1968). A conflict of a district court decision with decisions of its own or other courts of appeal is not, however, despite petitioners' veiled suggestion to the contrary, a basis for granting a writ of certiorari.